Office-Supreme Court, U.S.
FILED
JAN 3 1963
JOHN F. DAVIS, CLERK

No. 510

In the

Supreme Court of the United States

OCTOBER TERM, 1962

TEXAS CARBONATE COMPANY,
Petitioner,

v.

R. L. PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

PETITIONER'S MOTION FOR REHEARING

ROBT. H. RICE,
900 N. E. Military Drive,
San Antonio, Texas,
Attorney for Petitioner.

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

No. 510

In the

Supreme Court of the United States

OCTOBER TERM, 1962

TEXAS CARBONATE COMPANY,
Petitioner,

v.

R. L. PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

PETITIONER'S MOTION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Counsel for Petitioner believes that his client has not received at the hands of the lower courts nor from this Honorable Court that fair trial to which it is entitled, and in a final effort to reach the mind of this Court with the true facts and the proper application of established rules of law, files this Motion for Rehearing and in support thereof would show Your Honors:

The original six directors of the Texas Carbonate Company offered to employ L. H. Miller to sell its products on a

salary basis and he refused. (Record p. 16.) He told them: "I said I wouldn't work for a salary, I was an independent operator and would continue as such, so I then entered into the deal as sales agent of the company." On March 14, 1939, he assumed the duty of selling and marketing its products. At this time Luther H. Miller was a director *but was not an officer* of the company.

The recognized tests to determine when one is acting in the capacity of an Independent Contractor are:

1. The independent nature of his business. (Where a man was given the exclusive right to sell the products of a company, and nobody ever told him who to see, what to say, where to go, or give him any directions of any kind, was not his business independent?)

2. His obligation to furnish necessary supplies and material to perform the job. (Was not his furnishing his own car, his own travel expense, compliance with this test, when he worked five years without making more than his expenses?)

3. His right to control the progress of the work except as to final result. (Who tried to control L. H. Miller in the selling of this product? Nobody.)

4. The time for which he was employed. (It was not limited and he could not be fired.)

5. The method of payment, whether by time or by the job. (If he did not sell, he did not get paid.)

Surely, under these facts, from the beginning Miller was an independent contractor and could not have been anything

else. That being true, how in the world can it be said that later, when he became vice-president of the company, he was then an employee? This holding is clearly ridiculous.

Now we come to the employee question. We start with L. H. Miller as an independent contractor who had assumed the duty of selling and marketing petitioner's products. *Not being an officer*—only a director—there could have been not the slightest question but that he *was not* an employee. Then on the trial of this case when Judge Rice found that he could not be discharged, there having been no change in his contract relation with the company, how in the world could these Honorable Courts call him an employee merely because he had in the meantime been elected a vice-president of the company, for which office he received no pay? Maybe an officer of a corporation is an employee, but where he draws no pay as such officer, on what can the Internal Revenue Department base an assessment? The tax is based on wages, not on the honor of being an officer. Does the Revenue Service have the right to take part of an independent contractor's income and charge a company a percentage of it?

To state the question is to answer it. Such a proposition is clearly without basis in fact or law, and is plainly ridiculous.

Further, the Texas Carbonate Company has shown that its experience rate was not more than four tenths of one percent. Why should the Revenue Service have the right to collect three percent on L. H. Miller's privately earned income when the company was paying no more than the

4/10 of 1% on all its employees? This is clearly an unjust, unlawful assessment and this court is clearly supporting the Service in its wrongful action. The people who made the assessment well know that Luther H. Miller had paid self-employment taxes from the very first year that he was permitted by law to so do.

CONCLUSION

This highly prejudiced counsel for the petitioner submits that the decision of the District Court and the Circuit Court in this case were unfair, unjust and unlawful, and Your Honors by refusing the Writ are perpetuating a decision that is not based on law nor on right, and you are going contrary to what was intended by the Congress when it amended this law. Surely a clearer look should result in a judgment that would be fair and right.

Robt. H. Rice

ROBT. H. RICE,
900 N. E. Military Drive,
San Antonio, Texas,
Attorney for Petitioner.